

In the Matter of the Compensation of

Patrick D. McKinney, Claimant

Contested Case No: 06-035H

PROPOSED & FINAL ORDER

August 7, 2006

PATRICK D. MCKINNEY, Petitioner

HARTFORD UNDERWRITERS INSURANCE CO., Respondent

Before Nicholas M. Sencer, Administrative Law Judge

Pursuant to notice, the hearing convened on June 5, 2006 in Portland, Oregon before Administrative Law Judge Nicholas M. Sencer. Claimant was present and represented by his attorney James T. Guinn. John E. Snarskis represented the employer, Nason Cox, and its insurer, Hartford. Exhibits 1 through 9, together with interlineated exhibits A, B, and C. were admitted into the record. Exhibit 10 was excluded. The record closed on July 7, 2006, upon my receipt of claimant's reply argument.

I initially issued an Opinion and Order in this case on July 28, 2006. It was subsequently brought to my attention that the proper form of the order is a Proposed and Final Order. Accordingly, I have withdrawn the Opinion and Order and reissued my decision as this Proposed and Final Order. The appeal rights shall run from the date of this order.

ISSUES

Claimant challenges the January 20, 2006 Order of the Medical Review Unit ("MRU") that determined he is not entitled to discography at T1-2. The issue is whether substantial evidence supports the MRU's order, or whether the order reflects an error of law.

FINDINGS OF FACT

Claimant is a 40 year-old man. Claimant sustained a compensable injury on August 7, 1997. On September 5, 1997, the insurer issued a Notice of Acceptance of a disabling C6-7 disc herniation with impingement of C7 nerve root sheath.

(Ex B). On March 24, 1999 the Workers' Compensation Board approved a Claim Disposition Agreement pursuant to which claimant released all Workers' Compensation Benefits with the sole exception of his entitlement to medical benefits pursuant to ORS 565.245. (Ex C).

Claimant's attending physician is Eric Long, M.D. On October 24, 2005, Dr. Long examined claimant and determined that he would ask "Dr. Slack to proceed with T1-2 discography, if he feels that is feasible." (Ex 1, p 2). Dr. Long's chart note of that date indicates that claimant underwent C6-7 posterior discectomy on August 20, 1997 to treat the August 7, 1997 work injury.

(Ex 1, p 2). It also indicates a second surgery described as C6-7 anterior discectomy with fusion performed on October 9, 1997. (Ex 1, p 2). The chart note indicates a third surgery, described as C7-T1 anterior discectomy with fusion was performed on December 3, 2002. (Ex 1, p 2).

Dr. Long re-examined claimant on November 28, 2005. (Ex 4). Dr. Long's chart note of that date indicates that the insurer denied authorization of the T1-2 discography on the basis that the T1-2 level was not an accepted condition. (Ex 4, p 1). Dr. Long wrote, "I've explained to Pat that the T1-2 disc cannot be one of his accepted conditions because we do not know whether the T1-2 disc is normal and nonpainful or abnormal and painful." (Ex 4, p 1). Claimant requested administrative review of the insurer's decision to refuse to authorize the T1-2 discography.

In its January 20, 2006 order, the MRU determined that "absent a change in the compensable condition, the T1-2 discography proposed by Eric Long, M.D. is not a compensable medical service, and, if provided, Hartford Underwriter's Insurance Company is not liable." (Ex 8, p 3).

CONCLUSIONS OF LAW AND OPINION

The Court of Appeals has held, "if diagnostic services are necessary to determine the cause or extent of a compensable injury, the tests are compensable whether or not the condition that is discovered as a result of them is compensable." *Counts v. International Paper*, 146 OR App 768, 771 (1997). However, the Court of Appeals has also written, "We conclude that there is substantial evidence in the record to support the ALJ's finding that the tests were for the purpose of determining the extent of the original compensable injury and not, as employer contends, for the purpose of establishing the existence of a new or consequential condition." *Roseburg Forest Products v. Langley*, 156 Or App 454, 463 (1998). The implication of *Langley* is that the latter category of tests are not reimbursable.

In the instant case, the MRU relied on *Langley* to support its conclusion that tests to establish the existence of a new or consequential condition are not reimbursable. The determinative question, therefore, is for what purpose did claimant's physician order the disputed T1-2 discogram.

Based on the record before me, claimant's accepted condition is limited to a C6-7 disc herniation with impingement of C7 nerve root. To the extent claimant intends to assert a claim for the compensability of the T1-2 disc, that would be a new or consequential medical condition claim. Pursuant to *Langley*, tests to establish the existence of a new or a consequential condition are not reimbursable. Accordingly, I conclude that substantial evidence supports the MRU order and that it is consistent with the applicable law. Accordingly, the MRU order will be affirmed.

ORDER

The administrative order in case number MS 06-029 dated January 20, 2006 is affirmed.